PUBLIC PROSECUTOR v. CHEN KEE NAN

[A.Cr.J. (Pawan Ahmad J.) July 15, 1969]

[Ipoh — Criminal Appeal No. 1 of 1969]

Penal Code, s. 420 — Cheating — Post-dated cheques — Cheques issued against delivery of goods — Prima facie case.

The respondent was alleged to have placed an order for 35 sacks of rice and immediately after delivery of the rice he gave a post-dated cheque for $1460 as part payment instead of a cash payment of $2055 as agreed. Subsequently the respondent gave another post-dated cheque for the balance sum of $595. Both cheques were dishonoured when presented to the bank on the due dates. The learned president of the sessions court acquitted the respondent at the close of the prosecution case as he held that the prosecution had failed to prove dishonest intention on the part of the respondent. The Public Prosecutor appealed.

Held, allowing the appeal: as the post-dated cheques in this case were issued against delivery of goods and as the circumstances showed that when the respondent phoned the order for the rice he promised to make the payment in cash, there was sufficient *prima facie* evidence to show dishonest intention on the part of the respondent.

Cases referred to:—

(1) *Khoo Kay Jin* v. *Public Prosecutor* [1964] M.L.J. 22.

(2) *Mahadeo Prasad* [1954] Cr. L.J. 1806, S.C.

(3) *Shantilal* v. *State* [1956] Cr. L.J. 68.

MAGISTRATE'S CRIMINAL APPEAL.

M. Mahalingam (Deputy Public Prosecutor) for the appellant.

Lim Boon Seng for the respondent.

Pawan Ahmad J.: This is an appeal by the learned Public Prosecutor against the decision of the sessions court, Ipoh, whereby the respondent was acquitted and discharged on a charge of cheating under section 420 of the Penal Code at the close of the prosecution case.

The gist of the ground of appeal is that the prosecution had made out a *prima facie* case and the learned president was therefore wrong in law in not calling on the respondent to enter into his defence.

Briefly, the facts of the case are that on 9th August 1967 at about 11.00 a.m. Chong Lean Ching (P.W. 7) the manager of Guan Hin, a sugar, rice and hardware shop at No. 5 Jalan Yang Kalsom, Ipoh, received a phone call from a person in Chop Chew Eng Hin (Teck Kee) whom he subsequently discovered to be the respondent, placing an order for the supply of 35 sacks of rice at the agreed price of $2,055 and promising to pay this sum in cash on delivery. P.W. 7 accepted the order and on the same day delivered the rice by lorry through P.W. 3. Immediately after the rice had been delivered the respondent handed over to P.W. 3 a post-dated cheque (P.2) for the sum of $1,460 as part payment instead of a cash payment of $2,055 as agreed earlier on.

When P.W. 7 received P.2 from P.W. 3 he was dissatisfied because he had expected to receive a cash payment of $2,055 and so he immediately proceeded to Chop Chew Eng Hin (Teck Kee). There he met the respondent who admitted that he was the person who placed the order. The respondent then said that he had no cash in hand. After that he offered to give to P.W. 7 another post-dated cheque (P.4) for the balance sum of $595 still due on the rice and he gave an assurance that both P.2 and P.4 would be met on being presented to the bank on the due date and in due course. Since it was now inconvenient for P.W. 7 to take back the rice he agreed to accept the offer made by the respondent and thereupon the respondent handed over P.4 to P.W. 7. Both P.2 and P.4 were drawn by the respondent to the account of Chop Chew Eng Hin (Teck Kee) with the Bank Bumiputera Malaysia Berhad, Ipoh. Subsequently when P.2 and P.4 were presented to the bank for payment on the due dates they were dishonoured and returned to P.W. 7 with the words "account closed" stamped on them. As a result P.W. 7 lodged a report to the police about the transaction and the respondent was later arrested and charged.

The learned president in acquitting and discharging the respondent at the close of the prosecution case stated that the prosecution failed to prove dishonest intention on the part of the respondent. In coming to this conclusion the learned president relied largely on the commentary by *Gour's* Penal Law of India Volume IV at page 2217 which reads as follows:—

> "Where, therefore, a person gives a post-dated cheque in payment for goods already received and the cheque is dishonoured, there is only a breach of promise for which the remedy lies in a civil court, but the person cannot be held guilty of cheating. The giving of a cheque in lieu of money due even with the knowledge that the drawer had no funds in the bank does not amount to cheating. If the accused intended to deceive the complainant by falsely inducing him to believe that the cheque would be honoured, there is deception, but deception is only one element of the offence of cheating and not the only element. There can be no cheating unless the person deceived is induced to part with any property or to do or omit to do anything which he would not do or omit to do but for the deception."

In addition, the learned president also relied on the case of *Khoo Kay Jin v. Public Prosecutor.*[1]

Now, in *Gour's* Penal Law of India Volume IV, 8th Edition (1968) at page 3084 under paragraph "Post dated cheque", the learned author draws a distinction between a post-dated cheque given to discharge an existing liability and a post-dated cheque issued against delivery

of goods. This is what the learned author has to say in the matter:—

"A distinction must be drawn between a case where a post-dated cheque is given to discharge an existing liability and a case where it is issued against delivery of goods, property or cash with an assurance that it will be met on being presented to the bank on the due date and in due course. In the first case the failure to provide the balance is merely a breach of promise, whereas in the latter it may have different consequences. Intention of the drawer at the time the cheque is issued is a material test and if it appears from the circumstances of the drawer that he did not expect that the cheque would be cashed in normal course it would be *prima facie* proof of the intention to cheat."

Apparently, the learned president was not aware of this distinction and therefore he failed to distinguished the case of *Khoo Kay Jin, supra,* from the present case. In the first instance, in *Khoo Kay Jin's* case, *supra,* the post-dated cheque was issued some three days after delivery of the goods and it was therefore issued in order to discharge an existing liability whereas in the present case the first post-dated cheque P.2, at any rate, was issued and handed over to P.W. 3 immediately against delivery of the rice and further when P.4 was issued a little bit later the respondent gave an assurance that both P.2 and P.4 would be met on being presented to the bank on the due dates and in due course.

Again at page 1158 of The Law of Crimes by *Ratanlal and Dhirajlal,* 21st edition, the learned authors in their commentary under paragraph "Delivery of goods" state as follows:—

"Where the charge against the accused was in that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery but did not pay, if the accused had at the time he promised to pay cash against delivery an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But, if on the other hand, he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods, then a case of cheating would be established."

It has been so held in *Mahadeo Prasad.*[2] And in *Shantilal v. State*[3] it was held that the intention had to be gathered from the facts on record and if from them it is established that the failure to meet the cheque was not accidental but was a consequence expected by the accused, the presumption would be that the accused intended to cheat.

In order to ascertain the intention of the respondent at the time when he issued the post-dated cheques P.2 and P.4, it will be necessary to examine the surrounding circumstances. First of all when the respondent placed the order for the rice he promised to make the payment in cash but instead issued two post-dated cheques as payment against delivery. The promise to pay in cash was obviously to induce P.W. 7 to deliver the rice because he must have known if he did not make this promise P.W. 7 would not have agreed to deliver the rice to him as they were strangers and as they had no dealings with one another previously.

Next, according to the evidence of P.W. 1, the manager of Bank Bumiputera, Ipoh, the respondent opened an account in the name of Chop Chew Eng Hin (Teck Kee) with the bank on 26th July, 1967 with a cash deposit of $500 and on the same day made a withdrawal of $400. Between that date and 16th August, 1967 when this account was closed the respondent made two further deposits and two further withdrawals. During this period but after the two said deposits and the two said withdrawals the respondent issued 11 other cheques of various amounts but they were returned with the words "Refer to drawer" stamped on them because there was no money in the respondent's account to meet any of those cheques. Both P.2 and P.4 are included in those 11 post-dated cheques. From these circumstances it is obvious that when the respondent issued P.2 and P.4 he did not expect that they would be cashed in the normal course. In my view this is further strengthened by the evidence of P.W. 9, the shop assistant employed by Chop Chew Eng Hin (Teck Kee), who said that nearly all the goods in the shop had been removed through the back door a few days before P.2 and P.4 were due to be presented to the bank.

In view of these circumstances, I find that the learned president was wrong in coming to the conclusion that the prosecution had failed to prove a *prima facie* case. The appeal is therefore allowed.

Since the learned president who heard this case is no longer available to continue with the hearing of this case, I therefore order a re-trial before another president.

Appeal allowed. Re-trial ordered.

SEAH CHENG HOCK v. LAU BIAU CHIN

[O.C.J. (Winslow J.) July 16, 1969]

[Singapore — Divorce No. 75 of 1967]

Divorce — Constructive desertion — Ground that respondent has lived separately from petitioner for a period of not less than 7 years — Proof of constructive desertion — Meaning of "living separately".

The petitioner in this case petitioned for divorce on the grounds: (1) the respondent had deserted him for a period of at least 3 years immediately preceding the presentation of the petition, and (2) the respondent had lived separately from him for a period of at least